No. 20585

In the

United States Court of Appeals For the Ninth Circuit

ANITA T. OWENS,

Appellant,

vs.

RAYMOND WHITE, JOHN C. McCARTER, ALFRED POPMA, and ST. LUKE'S HOSPITAL, a corporation,

Appellees.

BRIEF OF APPELLEE ST. LUKE'S HOSPITAL

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

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STATUTES

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JURISDICTIONAL STATEMENT

Jurisdiction in the United States District Court for the District of Idaho, Southern Division, was established pursuant to the requirements of 28 U.S.C.A. 1332, upon diversity of citizenship, plaintiff being a resident and citizen of California (T.R. 6), defendant St. Luke's Hospital being an Idaho corporation with principal place of business in Idaho (T.R. 6), defendants Raymond White, John C. McCarter, and Alfred

Popma being residents and citizens of Idaho (T.R. 6), and the amount in controversy, exclusive of interest and costs, exceeding $10,000.00 (T.R. 11-12).

This court has jurisdiction to hear the appeal under provisions of 28 U.S.C.A. 1291 and Rule 73, Federal Rules of Civil Procedure, the appeal being from a final judgment dismissing appellant's complaint.

STATEMENT OF THE CASE

The appellant filed the original complaint in this action on October 14, 1963, seeking to recover judgment against the appellees for damages resulting from their alleged malpractice (T.R. 6-12). The malpractice was alleged to have stemmed from a misdiagnosis occurring during August of 1951 (T.R. 8, 9, 10). On December 30, 1963, the United States District Court for the District of Idaho, Southern Division, granted the appellees' motions to dismiss on the ground that, under the governing Idaho law, the appellant's right to recover was barred by the statute of limitations (T.R. 47-48). The appellant appealed, and on March 12, 1965, this Court reversed the judgment and remanded the cause for further proceedings (T.R. 57, 58-61). The opinion of this Court (*Owens v. White, et al*, 342 F. 2d 817) noted that, while the appeal was pending, the Idaho Supreme Court, in *Billings v. Sister of Mercy of Idaho*, 86 Idaho 485, 389 P. 2d 224 (1964), had aligned itself with jurisdictions holding that statutes of limitations in certain malpractice cases may begin to run when the plantiff knew or, by reasonable diligence, should have known of the alleged negligence. The opinion stated that the question of the application of this theory, generally referred to as the "discovery rule," was a matter of law for the trial court and

should be made the subject of a preliminary inquiry by the court, including the taking of evidence (T.R. 60). At such a hearing, the trial court was to determine whether the patient had such actual or constructive knowledge and, even if she did not, whether a balancing of the equities should permit such a tardy prosecution of the action (T.R. 60).

Pursuant to the foregoing opinion, the District Court, on June 2, 1965, held an evidentiary hearing to determine whether the "discovery rule" should be applied in ascertaining the date of accrual of the appellant's cause of action (T. R. Volume II). Thereafter, on June 22, 1965, the court filed its memorandum decision, including findings of fact and conclusions of law, determining that the "discovery rule" should not be applied in this case (T. R. 117-121). On July 26, 1965, the court filed formal findings, conclusions, and joint order in accordance therewith, at the same time granting the appellant's request to file an amended complaint (T. R. 173-174). The appellees thereafter moved for summary judgment dismissing the amended complaint, and on August 23, 1965, the court heard oral argument on the motions (T.R. Volume III). On September 21, 1965, the motion for summary judgment having been granted, the court filed additional findings of fact and conclusions of law determining that the appellant's amended complaint should be dismissed (T.R. 218-220), and on September 22, 1965, entered its judgment of dismissal with prejudice (T.R. 221-222, 223).

The appellant has now appealed to this Court for the second time, contending that the evidence is legally insufficient to support the findings of fact entered by the court, that the trial court applied an erroneous

legal standard in determining the applicability of the "discovery rule," and that the trial court erred in granting the motions to dismiss (T.R. 232).

STATEMENT OF FACTS

Simply stated, this is a case where the appellant, a skilled nurse with an active interest in the field of cancer, consulted Appellee Dr. Popma during August, 1951, concerning a lump in her left breast; was told first that a biopsy performed by Appellee Dr. White and analyzed by Appellee Dr. McCarter showed no malignancy and then subsequently that it did. She thereupon had the breast removed by Dr. White on August 28, 1951; did virtually nothing for eleven years, and now claims to have discovered during August 1962 that the diagnosis of cancer was incorrect. She filed the instant action in October, 1963, more than twelve years after the diagnosis and surgery complained of, and more than thirteen months after the alleged date of actual discovery. The Idaho statute of limitations provides that actions for personal injury must be brought within two years.

Detailed statements of evidence are set forth in the argument portion of this brief in support of the findings of fact entered by the trial court. However, in order to aid the Court, the following summary is also provided. Citations throughout the brief to the reporter's transcript of the June 2, 1965, hearing (T.R. Volume II) are designated with an "R." Citations to the reporter's transcript of the August 23, 1965 hearing (T.R. Volume III) are designated with "A.R." and citations to the clerk's transcript with "T.R."

The appellant is a college graduate (1948, R. 147) and a registered nurse (since 1943, R. 131, 147) who

has spent most of her adult life in the active practice of nursing, including teaching nursing (R. 108, 109) and supervising the work of other nurses (R. 118, 119). There is a history of malignancies in her family, both her father and an aunt having died from cancer (R. 136, 151). She herself had a special interest in the field, participating for a time in cancer prevention work (R114, 148) and, shortly before the surgery in question, had worked in Salt Lake City, Utah, with a Dr. Wintrobe, who was a leader in the field of malignant blood disorders (R. 103, 155-156). At the time of the surgery she was married, though she obtained a divorce in August, 1959 (T.R. 79-80).

In August of 1951, after moving to Boise, Idaho, the appellant discovered a lump in her left breast (R. 101). She phoned a doctor with whom she had worked in Salt Lake City and asked if he knew anyone she could see in Boise. This doctor referred her to Appellee Popma (R. 101). She then saw Dr. Popma, who examined her and advised her that the lump should be surgically removed, i.e., that a biopsy should be performed (R. 102). Dr. Popma furnished her with a list of three surgeons, including Appellee White. After further inquiries, she went to Dr. White, and the biopsy was performed at St. Luke's Hospital in Boise on or about August 26, 1951 (R. 104).

After the biopsy, the appellant was told by Dr. White that the tissue removed appeared to be nonmalignant (benign) (R. 104, 194). The next day Dr. White phoned her and, according to her testimony, said that there had been a mistake, that they did find some malignant tissue cells, and that she should be in the hospital the following morning (R. 104). A radical mastectomy (removal of the breast and surrounding tissue) was

performed by Appellee White on or about September 1, 1951 (R. 25, 104-105).

After the radical mastectomy, the appellant discussed her situation with Dr. White and was shown a pathological report indicating that no malignancy had been found (R. 116). The surgeon also outlined the follow-up treatment to be pursued, advising that since a pregnancy could activate a malignancy, they would radiate the chest and the ovaries to prevent pregnancy (R. 106). She subsequently underwent this series of radiological treatments, at the Radiology Department at St. Luke's Hospital (R. 107).

In February, 1952, the appellant moved to Pocatello, Idaho, to take a job teaching nursing at Bannock Hospital (R. 108-109). While there she saw her family physician, Dr. Roberts, showed him the surgery, and discussed her case with him (R. 109-110). At one point Dr. Roberts requested her history from Dr. White (R. 36, 189). In the years from 1952 to 1956, she did not see Appellee White, but in 1956 during a trip to Boise, she went to him for a physical examination (R. 112-114). In examining her, he found an enlargement of the thyroid and subsequently performed a thyroidectomy on her at St. Luke's Hospital (R. 112-113, 195).

The appellant testified that she also had physical examinations by Dr. White in 1957, 1958, and 1959, during visits to Boise to attend meetings as a volunteer worker for the American Cancer Society (R. 114-115). Dr. White testified from his records that he last saw her concerning the breast problem in April, 1952, that he saw her in January, 1956, performed a complete physical examination on her in August, 1958, and corresponded with her in 1959 regarding renewal of pre-

scriptions and assistance in locating a physician in California (R. 36, 188-189). Except for the 1956 thyroidectomy, all of the post-1952 consultations and examinations occurred at his private office in Boise, and not at St. Luke's Hosiptal (R. 195).

In 1959, after her divorce, the appellant moved to California, where she went to work for a Veterans Administration Hospital as a staff nurse, later becoming a nursing supervisor (R. 117-118). She testified that she knew "many doctors" in California (R. 121). In April, 1960, she went to Palo Alto to help open a new Veterans Administration Hospital (R. 119). There she became acquainted with a Dr. Shaw, an oncologist, a specialist in cell structures, whom she heard give a lecture concerning detection of breast malignancies (R. 119-120). In 1962 she consulted Dr. Shaw and in August of that year he asked her to sign a consent form so that her prior medical records could be forwarded to him (R. 122). She testified that, after obtaining the records, he called her in and told her that the Stanford Laboratory had read her slides "and that it was their feeling as well as his that I never had had cancer" (R. 123, 125). The instant action was filed, as noted above, in October, 1963, some thirteen months after this consultation.

Appellee White, meanwhile, had ceased his practice of medicine in Boise in May, 1961, and, on September 1, 1961, took a position as director of the Division of Social Economic Activities of the American Medical Association in Chicago (R. 27, 195). However, he maintained his residence in McCall, Idaho, and spent some six weeks each summer in Idaho (R. 196), as well as returning to that state on numerous other occasions during the subsequent years (T.R. 170-171, 177-178).

Appellee St. Luke's Hospital has at all times since August, 1961, and for many years prior thereto, continuously maintained and operated its principal place of business, on a 24-hour-a-day basis, at the same location in Boise, Idaho (T.R. 182, 183-185).

Appellee McCarter testified that since 1951, to the time of the June 2, 1965, hearing, he was in charge of the Pathology Department at St. Luke's Hospital and that in about September, 1962, he had received a letter from Dr. Shaw concerning examination of the slides from the 1951 biopsy performed on the appellant, and indicating the Stanford findings as sclerosing adenosis rather than cancer (R. 78, Exhibit 9).

Dr. McCarter also testified that there had been deterioration of the slides during the fourteen years since they were made, making it more difficult to interpret them. (R. 240, 245-246), that little was known about the narrow field of sclerosing adenosis in 1951, that considerable information about both sclerosing adenosis and other forms of disease of the breast has been developed since that time (R. 241), and that it would be possible to have a case of both sclerosing adenosis and breast cancer (R. 247-248). He could recall no other pathologist who had been practicing in the immediate area in 1951 and was still available (R. 244-245).

There was no evidence that the appellant did anything after the date of the alleged "discovery" beyond consulting an attorney or that either she or her attorney at any time prior to filing of suit gave any notice of claim to any of the appellees.

Nor did the appellant offer any evidence that the

appellee doctors were agents or servants of the appellee hospital, so as to make the hospital liable for any malpractice that might be proved on the part of the doctors. When counsel for this appellee attempted on cross-examination to ascertain the involvement of the hospital, counsel for appellant objected (R. 91, 158, 159, 190, 192).

SUMMARY

1. The District Court properly followed the procedures laid down by the Court of Appeals, and its findings of fact are fully supported by substantial, competent evidence.

2. The court properly determined that the "discovery rule" should not be applied to the instant case and that on a balance of equities, the prejudice to the appellees outweighs the desirability of permitting tardy prosecution of the appellant's cause.

3. The court properly granted summary judgment and dismissed the appellant's complaint in that the statute of limitations was not tolled by her marital status.

4. The suit cannot be saved by the intermittent absence of Appellee White from the state some ten years after the date of surgery.

5. The appellant's thirteen-month delay in filing suit after the alleged actual "discovery" should bar the action even if the discovery rule were otherwise applicable.

6. Dismissal as to Appellee St. Luke's Hospital must be upheld in any event as there was no showing

that the hospital could be liable for any malpractice that might be proved.

ARGUMENT

I

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE FINDINGS OF FACT ENTERED BY THE DISTRICT COURT.

The appellant's initial specification of error is that the evidence is legally insufficient to support the findings of fact entered by the court. Such is manifestly not the case. In fact, each and every one of the findings entered by the court is supported fully by legally sufficient evidence.

Before turning to a discussion of that evidence, however, it is necessary to briefly consider the procedure followed by the District Court. Counsel for appellant contends in his brief (pp. 15-21) that the trial court erred in following the directions of this Court set forth in the opinion reversing and remanding the cause on appeal from the previous dismissal (*Owens v. White, et al, supra* T.R. 58-61). He insists, notwithstanding that opinion, that the applicability of the "discovery rule" should be a question of fact, to be decided by the jury in keeping with the appellant's demand for a jury trial; that as there were issues as to material facts, the motions for summary judgment should have been denied.

This appellee agrees that the usual rule applicable to motions for summary judgment is that allegations of fact in the non-moving party's reply to the motion are to be accepted as true and that where there is a genu-

ine issue of fact, the motion should ordinarily be denied. The instant case, however, did not present a usual or ordinary summary judgment situation. Here the evidence heard and considered by the court in arriving at the findings of fact complained of by the appellant was not in a hearing on motion for summary judgment, but at a unique preliminary "trial within a trial" to determine an issue of law—whether the newly adopted Idaho "discovery rule" should be applied to the instant case. Once that question was answered in the negative, there were no longer any issues of material fact, and the motions for summary judgment were properly granted.

In remanding the cause, the Court of Appeals correctly stated that the law of Idaho, before adoption of the "discovery rule," was that whether a plaintiff's claim has accrued may be a question of law to be determined by the court, citing *Chemung Mining Co. v. Hanley, 9 Idaho* 786, 77 Pac. 226 (1904), (see also *Trimming v. Howard*, 52 Idaho 412, 16 P. 2d 661) for such a question goes to the very existence of the cause of action itself. From that it follows that the same would be true after adoption of the discovery rule. Although the Idaho Supreme Court in its 1964 decision adopting the discovery rule *(Billings v. Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P. 2d 224) did not explicitly state that such determination was to be a preliminary matter, the opinion made it clear that the basic question to be decided was one of law—whether a cause of action had accrued and the statute of limitations had commenced to run.

In his argument that the question of when a cause of action has accrued is one for the jury, counsel for appellant cites the Idaho cases of *Gerlach v. Schultz*, 72

Idaho 507, 244 P. 2d 1095, and *Galvin v. Appleby*, 78 Idaho 457, 305 P. 2d 309. Neither of these cases involved a jury, and neither decision contains anything from which it can be concluded that the existence of cause of action must be a jury question if a jury is demanded. Furthermore, the *Gerlach* case was an action involving fraud, coming within a different statute of limitations which, as noted elsewhere in this brief, provided specifically that such an action would not accrue until discovery of the fraud. In *Galvin*, a contract action, the issue of bar by statute of limitations was raised by demurrer. The Idaho court, as did the trial court here, took evidence (albeit not at a preliminary hearing) and ruled as a matter of law upon the question of when the action accrued. The appellant has cited no Idaho cases, and we have found none, which would in any way preclude the application of the logic of Professor McCormick, cited by this Court, that it is unrealistic to expect a jury to perform the "intellectual gymnastic" of adjudicating both the limitations question and the merits. *McCormick, Evidence*, Section 53 (1954). In fact, as the question is grounded in equity, there could be no right to a jury determination.

Accordingly, this Court suggested to the trial court that the question of applicability of the discovery rule to the instant case should be made the subject of a preliminary inquiry, including the taking of evidence:

> "Whether plaintiff's claim has accrued is a question of law (citing *Chemung*), and like all issues of law must be resolved by the court even though this will require evidence; in other words, the issue presents a preliminary matter for the court, rather than the jury, since it does not reach the merits of the claim but instead involves the very existence of the claim itself . . ."

It then, again placing itself in the eyes of the Idaho Supreme Court, suggested that application of the discovery rule should be tempered by equitable considerations, in effect saying that the trial court should hear and consider even conflicting evidence and weigh the equities to reach its determination:

". . . we deem it appropriate to add the following caveat: Consistent with the prominence given to the policy underlying statutes of limitations in *Billings, supra*, we believe the Idaho court would temper application of the discovery doctrine by hedging it with equitable considerations. To illustrate, courts in other states that have applied the discovery doctrine to non-foreign object cases have emphasized factors such as the 'continuing relationship' between doctor and patient as a reason for applying the rule. (Citations) This suggests, in our estimation, that the discovery doctrine is itself subject to some restraint as the time from the occurrence of the malpractice grows greater. In such circumstances, the considerations of fairness to the defendant underlying statutes of limitation become more insistent, while the plaintiff's appeals to equity implicit in the discovery doctrine become less so. We believe the Idaho courts would apply a concept akin to the equitable doctrine of laches to limit the discovery rule, a rule which itself has its genesis in equity. Thus the suit of a plaintiff who is reasonably diligent may be barred if the defendant shows undue prejudice because of an extreme lapse of time between the commission of the wrongful act and the commencement of suit. To so conclude strikes us as a reasonable accommodation between the competing considerations noted in *Billings* of giving full scope to the statute of limitations

> on the one hand and according a reasonable measure of justice to the plaintiff on the other."

To make it even more clear that court should weigh all the evidence bearing upon the point, the decision noted that:

> "Factors which might be considered in making such a determination would be illustrated by but not limited to: the nature of the alleged injury, the relative difficulty of proving the wrong as contrasted with rebutting the proof, the availability of witnesses and records, the existence of a continuing relationship between doctor and patient, and the inherent difficulty of discovering certain wrongs."

Thus it is clear that the trial court was to sit as a trier of fact for this preliminary matter and, from its findings of fact therefrom, to enter its conclusions of law on the question of whether the discovery rule should be applied. That is exactly what the court did. It complied fully and precisely with the directions of the appelate decision, and its procedure must be upheld.

It should be noted that if counsel for the appellant had really believed that the opinion of this Court in *Owens v. White, et al* was wrong, he could and should have petitioned for rehearing and pointed out the alleged errors. Having not done so, that opinion stands as the law of the case, and the trial court was required to follow it. That court then properly considered the subsequent motions for summary judgment of dismissal as it would have done in any case so standing.

It should also be noted that to the extent that counsel for appellant contends the matters should have been raised by answer, the record is clear that trial counsel

was given an opportunity by the court to stand on such a position and declined to do so (A.R. 18-19). In addition, he has failed to object to Finding No. II of the Court's Findings of Fact and Conclusions of Law of September 21, 1965 (T.R. 219), which is as follows:

> "At the said hearing of August 23, 1965, counsel for the plaintiff stipulated that the Motion for Summary Judgment was properly before the court and directed to the plaintiff's Amended Complaint, waiving the objection that an Amended Answer to the Complaint, or in the alternative, a Motion raising the Statute of Limitations, had not been made."

Turning now to the appellant's contention that the court's findings of fact are not supported by sufficient evidence, it is clear that with regard to the June 2, 1965 evidentiary hearing the District Court was sitting as a trier of fact just as it would in a trial to the court on the merits. Thus it was bound to decide the issue on a preponderance of the evidence.

The issue was whether, in effect, there could be a claim constituting a cause of action, and, as stated by this Court in the remanding opinion, "the burden of establishing a claim rests upon the plaintiff" (T.R. 60).

Thus, the findings of the court must be reviewed according to the usual rules for review of findings by a tier of fact, and subject to the usual presumption of correctness. The general rule is well stated in 3 Am. Jur., Appeal and Error, Section 896, pp. 458-461, as follows:

> "Superior appellate courts are, primarly, constituted for the purpose of dealing with questions of law; the consideration of any question of fact by such a court

involves a decision on the record without any opportunity being afforded for judging as to the credibility of witnesses except insofar as discrepancies may appear in the testimony in the record. The trial court is naturally in a better position to pass on the credibility of the witnesses, and the appellate court will not, in fact, generally speaking, cannot, set itself up as a judge of the credibility of witnesses, or weigh the evidence, even though a preponderance of it against the finding or verdict is apparent. The question of credibility of witnesses and the weight to be given their testimony is exclusively within the province of the trial court; the province of the appellate court is to determine whether there is any evidence from which the trial court might properly have drawn its conclusion. As has been pointed out, discrepancies are more likely to appear in the record of the testimony of a candid witness than in that of an astute perjurer. These considerations have led the appellate courts to deal with findings of fact made by the trial judge, especially upon oral testimony of witnesses, where he has had full opportunity to observe the demeanor of the witnesses and judge their veracity, in much the same manner as they would with the verdict of a jury, according to such findings the same conclusiveness and binding effect, or the same weight, as a verdict of a jury would have been accorded had one been rendered. They will not as a general rule be disturbed by the appellant court unless they are clearly contrary to, or plainly, flagrantly, or indisputably against, the evidence, or are so clearly contrary to the preponderance of the evidence as to produce in the minds of the reviewers a conviction amounting to a reasonable certainty that they are wrong. These findings should not be disturbed or

modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts, or unless they are in conflict with the settled rules of logic and reason and contrary to what any reasonable mind would find. They will not be disturbed unless a mistake of judgment is apparent, or unless they are plainly and clearly wrong, and cannot be supported on any rational view of the testimony. If a judicial mind could, on due consideration of the evidence as a whole, reasonably have reached the conclusion of the court below, the findings must be allowed to stand. Such findings will not be disturbed when supported or sustained by competent evidence, especially where the evidence is conflicting or where different inferences can reasonably be drawn therefrom. In such cases the conclusion of law only is reviewable."

The Idaho Supreme Court has made it clear that it will not disturb the findings made by the trier of fact if those findings are supported by any substantial and competent evidence, no matter how meager the evidence may be. In *Watkins v. Watkins*, 76 Idaho 316, 281 P. 2d 1057, the court put it this way, at p. 325:

"The findings made by the trier of facts, supported by substantial, competent though conflicting evidence, however meager, will not be disturbed on appeal. (Citations)"

In *Smith v. Clearwter County*, 65 Idaho 271, 143 P. 2d 561, the court stated, at pages 277-278:

". . . This court is committed to the rule that findings supported by substantial evidence (are) controlling on appeal, and that where there is sufficient compe-

> tent evidence, if uncontradicted, to support (the) findings, the findings will not be disturbed. (Citations) Furthermore, this court has universally held that where the facts 'might very well lead different minds to reaching different conclusions upon the issues presented; and where such is the case, however meager the evidence, if it is of a substantial nature and character, the findings of the triers of fact should prevail.' "

In *Angleton v. Angleton*, 84 Idaho 184, 370 P. 2d 788, it was said, at p. 198:

> "Moreover the trial court, not this court on appeal, resolves the conflicting evidence and determines the weight, credibility and inferences to be drawn from such evidence. (Citations) That the trial court could have viewed the facts differently, or that we might perhaps have done so, if we had been the initial trier thereof, does not alone entitle us to reverse the case. Under the mandate of Rule 52 I.R.C.P., a reviewing court is to accept the trial court's findings of fact *unless clearly erroneous*, and if conflicting inferences may be drawn from the established facts, it is not within the province of the appellate court to substitute its judgment for that of the trail court."

And, again, in *Conley v. Amalgamated Sugar Co.*, 74 Idaho 416, 263 P. 2d 705, at p. 424:

> "After the court has found, the criteria are not what other or different findings the evidence could or would sustain, not what findings are plausible, not the weight or quality of the evidence or credibility of witnesses, but the sole criterion is simply whether there is substantial evidence, regardless of conflict, to sustain the findings as made, with all

reasonable inferences and intendments in favor thereof. This proposition is so universal, so oft repeated and adhered to as to need no citation of authority in support thereof. It is not what evidence tends to support appellant, or negative that favorable to respondents, but it is what evidence tends to support respondents, with all reasonable inferences and intendments to be drawn in favor of respondents, which controls the determination of the controversy in this court."

To the same effect, see *In re Randall's Estate*, 58 Idaho 143, 70 P. 2d 389; *Nelson v. Altizer*, 65 Idaho 428, 144 P. 2d 1009; *Chatterton v. Luker*, 66 Idaho 242, 158 P. 2d 809; *Loosli v. Heseman*, 66 Idaho 469, 162 P. 2d 469; *Jackson v. Blue Flame Gas. Co.*, ____ Idaho ____ 412 P. 2d ____.

Here the evidence supporting the findings of the court is far more than meager. In every instance there is substantial, competent evidence, and as to many of the findings it is virtually uncontradicted.

The court's Finding No. 1 is as follows:

"That the plaintiff was, for a number of years, prior to the surgery, a registered nurse, actively pursuing her profession, and was a college graduate with a degree of Bachelor of Science in that field." (T.R. 118.)

The appellant herself testified that she received three years of nurses' training at Good Samaritan Hospital in Portland, Oregon, becoming a registered nurse in 1943 (R. 131, 147), that she received a bachelor of science degree in education from the University of Utah in 1948 (R. 100, 147), and that she continued her training by attending a workshop at the University

of Colorado in 1955 (R. 149) and by attending Wayne University in Detroit (R. 149). She further testified that she was a nurse in the Army in 1943 and 1944 (R. 150) and that she worked as a nurse in Salt Lake City from 1947 to 1949 (R. 100). Such is clearly substantial, competent and uncontradicted evidence.

Counsel for appellant quibbles with the finding that the appellant's' degree was "in that field," when she testified that it was a degree in education. It should be noted, however, that her testimony was that she got the degree in order to teach nursing (R 147) and that she received some 45 hours of credit toward the degree for her nurses' training (R. 147). Surely this means substantially that the degree was in the general field of nursing.

Finding No. 2 is as follows:

> "That she remained, during all of the time after the surgery, actively in the nursing profession, working in hospitals, and was also active in cancer prevention work." (T.R. 118.)

Again, the pertinent evidence is from the appellant's own uncontradicted testimony. In February, 1952, immediately after release from her post-surgery treatment, she returned to Pocatello, Idaho, where she went to work at Bannock Memorial Hospital (R. 109). Sometime before 1956 she joined her husband in Montana for a year, but returned to Malad, Idaho, where she worked with the American Cancer Society in a cancer prevention program during 1956, 1957, and 1958 (R. 114, 148). In 1955 she took special training at Wayne University in Detroit (R. 149), and in 1959, she went to California, where she continued to work as a nurse and nursing supervisor in Veterans Adminis-

tration hospitals up to the date of the hearing (R. 116, 118).

Although perhaps the record does not account for her entire time since the surgery, it is clear that she continued to be active within the profession, including the stated types of activity. In fact, at one point during her testimony, the following appears:

"Q. You have, however, been actively involved as a nurse employed in a hospital during these many years, have you not?

"A. Yes." (R. 154).

In short, the evidence is more than ample to support the finding.

Finding No. 3 is as follows:

"That the plaintiff was originally advised, prior to the surgery, that the lump in her left breast was benign. One or two days after the plaintiff was so advised, a defendant called her by phone, to inform her that an error had been made and that the tissue was malignant, in that it was cancerous." (T.R. 118.)

Again the appellant's own testimony was in clear support of the finding, as follows:

"A. He said, 'You are a lucky girl. It is benign. You can go home,' and so I got up and went home.

"Q. When was the next time you heard from Dr. White?

"A. The next day, I believe about dinnertime. He called me and said that there had been a mistake and that they did find some malignant tissue cells and I should be in the hospital the next morning." (R. 104)

Finding No. 4 is as follows:

> "That after the surgery, plaintiff was advised by the defendant, Dr. White, that the excised flesh contained no malignant cells, and that all of the malignacy had been in the tissue removed in the biopsy which was performed prior to the surgery." (T.R. 118.)

The appellant's testimony, in answer to a question by her own counsel, was that she was told by Dr. White after the surgery, "I think we got it all" (in obvious reference to the biopsy) and that (from the surgery) they hadn't found any malignancy (R. 116). She said he even showed her the pathology report to reassure her (R. 116) and she understood it (R. 152). Again, this is clearly ample to support the finding.

Finding No. 5 is:

> "That the plaintiff professed to be conscious and worried, at all times after the surgery, of the possibility of a recurrence of development of cancerous cells in her body." (T. R. 118-119.)

The appellant testified that immediately after the surgery she was apprehensive and "wanted to know if it was a little amount or a big amount" (R. 116), that she was "concerned about whether I was going to live or die" (R. 106), that she kept getting complete physicals for reassurance (R. 112-113, 115), that she knew that in cancer talk "they don't say you are cured, they say you are at a five year survival or a 10 year survival—and I was at eight year survival . . ." (R. 117), that she checked with Dr. White in 1959 to see if it was foolhardy to go to California and work (R. 117), that she was cancer conscious because of the death of her

father and aunt from cancer (P. 136), and that "there are a lot of things about cancer that you kind of lean on your doctor" (R. 113). Surely this plainly paints a picture of a woman acutely conscious of the possible recurrence of a cancer and fully supports the finding of the court.

Finding No. 6 is:

"That plaintiff knew at all times that great improvements were being made in the diagnosis and detection of cancer in the human body. She worked, through the years after the surgery, in hospitals where laboratories were maintained and pathologists retained." (T.R. 119).

As noted above, the appellant testified that she worked for several years with the American Cancer Society in a program of public education, including the subject of breast cancer (R. 148) and that she worked in various hospitals as a nurse, supervisor and instructor in the years after the surgery. She further testified that while she was working at the Veterans Administration Hosiptal in California, she knew "there were many research things going on" (R. 119), that she had never worked in a hospital the size of Appellee St. Luke's in Boise that did not have a pathologist on its staff (R. 130), and that she understood the mission of a pathologist (R. 131-132). The evidence is sufficient to support the finding.

Finding No. 7 is:

"That plaintiff knew at all times that the defendant hospital records and the slides on which the diagnosis was predicated were available for examination at her simple request." (T.R. 119).

The correctness of this finding is abundantly clear. The appellant testified that such was the fact (R. 160), and her trial counsel stipulated that such records would have been available to any recognized physician or hospital at any time upon request (R. 236).

Finding No. 8 is:

"For a period of eleven years from the date of the surgery she made no investigation to determine the accuracy of the diagnosis on which the surgery was based." (T.R. 119.)

Again, the appellant testified that she made no investigation of any kind until the Shaw lecture in 1962 (R. 143). Thus the finding must be affirmed.

Finding No. 9 is:

"That twelve years elapsed between the date of surgery and the date suit was filed." (T.R. 119.)

The date of surgery, according to the testimony of Dr. White, was September 1, 1951 (R. 25). The appellant placed the date at August 28, 1951 (R. 104-105). The complaint was filed in October 14, 1963 (T.R. 6). The finding must stand.

Finding No. 10 is:

"That the tissue samples on which diagnosis was had were originally treated and placed on slides, which slides are now deteriorated to some degree." (T.R. 119.)

Appellee McCarter, under whose supervision the slides were prepared and under whose custody they remained, testified at length as to how the slides were

made and that they had deteriorated to a degree since they were made (R. 240, 246, 248-253). As to counsel for appellant's contention that a diagnosis was possible, the doctor testified that they were readable, but "in the same sense that you could read an old book in poor light" (R. 257). The finding is clearly supported by sufficient evidence.

Finding No. 11 is:

> "That evidence as to the standard of care and competence ordinarily exercised by physicians, especially pathologists in the detection and diagnosis of cancer, in the Boise, Idaho, area, in the year 1951, will be most difficult to procure." (T.R. 119.)

Appellee McCarter testified, without contradiction, that so far as he knew, no other pathologist who was practicing in the Boise area in 1951 is still available (R. 243, 245). A Dr. Carl in Twin Falls, Idaho, is about the same age as Dr. McCarter and had the same period of schooling, but he was not in Idaho in 1951 and did not come to the state until two or three years before the hearing (R. 243, 244). In the meantime, since 1951, there has been considerable development with regard to diagnostic practices and techniques within this field (R. 241) and, as would have been clear even without testimony, it would be difficult to remember details as far back as 1951 (R. 242). The finding must be affirmed.

Finding No. 12, the final finding from the June 2 hearing, is:

> "That while the plaintiff sometimes sought out the defendant, Dr. White, for medical attention, during the years after her surgery, she also saw and con-

sulted other physicians and did not rely solely on Dr. White for medical advice and treatment. That the plaintiff had not lived in the community or general vicinity of Boise, Idaho, from the date of surgery until the present time. That there was not a continuing relationship of doctor and patient after the post-operative surgery and treatment in the usual sense between the plaintiff and the defendants." (T.R. 119-120.)

The appellant testified on several occasions to the effect that Dr. Roberts in Pocatello had been her family physician for all her life (R. 102, 140), that even on the day of the surgery she had Dr. White call Dr. Roberts (R. 140), that Dr. White was in communication with Dr. Roberts "simultaneously whenever I was Dr. White's patient" (R. 140), and that she saw Dr. Roberts on occasions after the surgery (R. 110, 139). Furthermore, she testified that she "knew" many doctors in California (R. 121). Appellee White testified from his records (which appellant confirmed that he kept, R. 115) that he last saw her concerning the breast problem in April, 1952, that he saw her in January, 1956, in connection with the thyroidectomy, that he performed a physical examination on her in August, 1956, and corresponded with her in 1959 (R. 188-189). The correspondence was in part in response to her request that he assist her in locating a physician in California (R. 36, 189). In June, 1956, Dr. White was asked by Dr. Roberts to forward the appellant's medical history to him in Pocatello (R. 36, 189).

It is manifest from the record that the appellant left the Boise area soon after the surgery complained of (R. 108-109) and returned only for visits and for the

thyroidectomy in 1956 (R. 112-115). In 1959, she moved to California (R. 117).

Thus the evidence is fully sufficient to support the finding.

The proposed findings of fact detailed by counsel for appellant on pages 23 to 29 of his brief are in some cases mere quibbles with details in wording of the court's findings. In other instances they are clearly contrary to the findings adopted by the court in its wisdom and, as noted above, fully supported by sufficient evidence. At any rate, as it was put by the Idaho Supreme Court in *Conley v. Amalgamated Sugar Co.*, *supra*, p. 424:

> " . . . The criteria are not what other or different findings the evidence could or would sustain, not what findings are plausible, not the weight or quality of the evidence or credibility of witnesses, but the sole criterion is simply whether there is substantial evidence, regardless of conflict, to sustain the findings as made, with all reasonable inferences and intendments in favor thereof.

That criterion has been fully met in the present case, and the findings of fact made by the court must be affirmed.

II

THE TRIAL COURT PROPERLY APPLIED THE DIRECTIONS OF THIS COURT IN DETERMINING THE APPLICABILITY OF THE DISCOVERY RULE AND PROPERLY CONCLUDED THAT THE RULE SHOULD NOT BE APPLIED.

As the trial court so well stated, in its Memorandum Decision of June 22, 1965:

> "That this case is such a stale one as the Statute of Limitations generally bars cannot be doubted." (T. R. 117.)

The Idaho statutes involved, I. C. Sections 5-201 and 5-219, state simply:

> "5-201. *Limitations in general.*—Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, * * *"

> "5-219. *Actions against offices, for penalties, on bonds, and for personal injuries*—Within two years:
>
> * * *
>
> "4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another.
>
> * * *"

Here the alleged negligence and malpractice occurred in August and September of 1951. The complaint was not filed until October of 1963—more than twelve years later!

As we read the opinion of this Court in *Owens v. White, et al supra,* the trial court's original dismissal was reversed and the cause remanded solely because of adoption by the Idaho Supreme Court, after the appeal, of the so-called "discovery rule." That court, in the decision in point *(Billings v. Sisters of Mercy of Idaho, supra)*, stated the rule as follows, 86 Idaho at 497-498:

> "We will, therefore, adhere to the following rule: where a foreign object is negligently left in a pati-

ent's body by a surgeon and the patient is in ignorance of the fact, and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learns of, or in the exercise of reasonable care and diligence should have learned of the presence of such foreign object in his body."

This Court, in its wisdom, concluded that Idaho would invoke the same rule in a misdiagnosis case and remanded the cause to the District Court for a determination of whether the rule should be applied to the instant case and, thus, whether the appellant's claim had accrued. This issue, it said, is a question of law that

"must be resolved by the court even though this will require evidence; in other words, the issue presents a preliminary matter for the court, rather than the jury, since it does not reach the merits of the claim but instead involves the very existence of the claim itself." (T.R. 60.)

As noted above, the author of the decision, Judge Koelsch, laid down in detail certain guidelines to be followed by the District Court in its determination:

"In sum, we hold that the discovery rule may be invoked in this case, and whether it is to be applied is a preliminary legal question for the court to determine. This conclusion requires that the judgment be reversed and the cause remanded. Accordingly, we deem it appropriate to add the following caveat: consistent with the prominence given to the policy underlying statutes of limitations in *Billings*, supra, we believe the Idaho court would temper application of the discovery doctrine by hedging it with equitable considerations. To illustrate, courts in other states that have applied the discovery doctrine to non-

foreign object cases have emphasized factors such as the 'continuing relationship' between doctor and patient as a reason for applying the rule. (Citations) This suggests, in our estimation, that the discovery doctrine is itself subject to some restraint as the time from the occurrence of the malpractice grows greater. In such circumstances, the considerations of fairness to the defendant underlying statutes of limitation become more insistent, while the plaintiff's appeals to equity implicit in the discovery doctrine become less so. We believe the Idaho courts would apply a concept akin to the equitable doctrine of laches to limit the discovery rule, a rule which itself has its genesis in equity. Thus, the suit of a plaintiff who is reasonably diligent may be barred if the defendant shows undue projudice because of an extreme lapse of time between the commission of the wrongful act and the commencement of suit. To so conclude strikes us as a reasonable accommodation between the competing considerations noted in *Billings* of giving full scope to the statute of limitations on the one hand and according a reasonable measure of justice to the plaintiff on the other.

"Factors which might be considered in making such a determination would be illustrated by but not limited to: the nature of the alleged injury, the relative difficulty of proving the wrong as contrasted with rebutting that proof, the availability of witnesses and records, the existence of a continuing relationship between doctor and patient, and the inherent difficult of discovering certain wrongs."

It is manifest from the record and from the findings of fact entered by the court, discussed in the previous section of this brief, that the trial judge did just as

this Court suggested he do. He heard a very long day of testimony on every facet of the issue involved. He then made his findings of fact, including specific findings on all of the particular factors suggested in Judge Koelsch's opinion, weighed the equities, and concluded as a matter of law that the discovery rule should not be applied in the instant case (T.R. 116-120).

Counsel for appellant devotes a large portion of his brief to the fact that the court concluded that the appellant "could have, by exercise of due diligence, discovered the alleged malpractice at any time after the surgery and treatment complained of" (T.R. 120) rather than that she *should* have done so. He cites numerous cases to the effect that the discovery rule as applied in jurisdictions invoking it requires a showing that a plaintiff "should" have discovered the malpractice before the cause of action will be said to have accrued.

We are aware, as without doubt was the court, that the discovery rule decisions generally use the word "should." But to bring an appeal upon the difference and to base thereon a contention that the court applied an erroneous legal standard in its determination is, we think, again mere quibbling. There is frequently little to be gained by trying to speculate as to why a particular word has been used instead of another in a given situation. However, it can be noted here that the word "could" is the same word used by the appellant in the pertinent allegations, both in the original complaint (Paragraph IX, T.R. 8) and in the amended complaint (Paragraph IX, T.R. 125) filed by leave of the court after the discovery rule hearing.

It is clear from an analysis of the discovery rule itself that the findings here support a conclusion

phrased with either "could" or "should." As stated by the Idaho court in *Billings*, and noted by this Court in the opinion by Judge Koelsch, the underlying theme in all such cases is a conflict between the policy of discouraging the fostering of stale claims and the policy of allowing meritorious claimants an opportunity to present their claims (86 Idaho at 489). Thus the crucial portion of the rule is not the difference between "could" and "should," but the presence or absence of "due diligence" such as to weight the equities in favor of allowing the plaintiff to present the claim. The trial court found that the appellant knew that all the evidence of the alleged malpractice was available to her at all times after the acts complained of and that she did nothing for approximately eleven years to discover any wrong. He then concluded in effect, that under the circumstances, had she exercised the "due diligence" required by the law she "could," "should," or even "would" have discovered the malpractice, if any there be, at any time after the surgery. That conclusion, however phrased, must be upheld.

It cannot be emphasized too strongly, that the appellant is not an ordinary plaintiff. She is not the typical medical patient, unschooled and unknowledgeable in medical matters, who must of necessity rely in almost blind faith in what she is told of matters she can't begin to comprehend. As detailed in the discussion of the findings of fact, this appellant is a highly trained, skilled nurse who has maintained her standing as an active member of her profession. She professed to be conscious and worried, at all times after the surgery, of the possibility of a recurrence of cancerous cells in her body (Findings of Fact No. 5, T.R. 118-119). She was active in cancer prevention work (Finding of Fact No. 2, T.R. 118). She even described herself as "cancer-

wise" (R. 103) and "cancer conscious" (R. 135). She knew at all times that great improvements were being made in the diagnosis and detection of cancer in the human body and worked, through the years, in hospitals where laboratories were maintained and pathologists retained (Finding of Fact No. 6, T.R. 119). She knew at all times that the hospital records and the slides on which the diagnosis was predicated were available for examination at her simple request (Finding of Fact No. 7, T.R. 119). She testified that she was aware of the role of the pathologist in diagnosis (R. 131-132) and that she realized that his diagnosis was but an opinion (R. 132, 155). As a nurse she would know that there might be differences of opinion as to diagnosis. Yet, for eleven years, she did nothing by way of investigation to determine the accuracy of the diagnosis on which the surgery was based (Finding of Fact No. 8, T.R. 119).

Add to these the fact that she had notice even before the surgery that there had been inconsistent diagnoses. This is not a case where she was given no clue that a mistake might occur. Rather, she was told by the surgeon immediately after the biopsy that the lump from her breast was benign and then a day or two later that *an error had been made* and that the tissue was malignant, in that it was cancerous (Finding of Fact No. 3, T.R. 118). To even a layman, let alone a medically experienced person, this should have been a red flag—particularly when the surgeon advised her after the "radical" that no further malignant cells had been found (Finding of Fact No. 4, T.R. 118). She had constant notice that the diagnosis might be wrong, but she ignored it. She let years pass during which conditions changed; yet she made no effort to discover

whether her rights had been violated. Such is plainly not due diligence.

The findings noted above should be sufficient alone to support the conclusions of the court. Yet there is more, too. Here there was not the type of continuing doctor and patient relationship noted in Judge Koelsch's opinion and in many of the cases cited by counsel for appellant (Finding of Fact No. 12, T.R. 119-120). Nor was there absence of undue prejudice to appellees because of the extreme lapse of time between the commission of the alleged wrongful acts and the commencement of suit. To the contrary—the evidence has grown stale, the slides containing the tissue samples from which diagnosis was had have deteriorated to some degree (Finding of Fact No. 11, T.R. 119), and it would be most difficult to procure any evidence as to the standard of care and competence ordinarily exercised by physicians, especially pathologists, in the detection and diagnosis of cancer, in the Boise, Idaho, area, in the year 1951 (Finding of Fact No. 12, T.R. 119).

Counsel for appellant, at pages 28 and 29 of his brief, contends that the case of *Gerlach v. Schultz*, 72 Idaho 507, 244 P. 2d 1095, is analogous to the case at bar and would indicate that availability of certain facts, even when contained in recorded documents, does not mean that a party is charged with the duty of discovering them. What he fails to note is that that was a case of fraud, governed by a different statute. The statute there, I. C. Section 5-218, provided:

"* * *

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued *until the discovery*, by the aggrieved party, of the facts constituting the fraud or mistake." (Emphasis added)

Here the statutes does not require discovery, nor does the opinion of the Idaho court in *Billings*, or the opinion of this Court, or the discovery rule itself. What is required in order to justify a tardy claim is a showing of due diligence sufficient to justify equitable relief against potential prejudice to the defendents. After all is said and done, the statute of limitations is still a part of the law of Idaho. This Court's decision did not erase it, but merely said that the appellant should have the opportunity to show why she could not, or should not, have discovered her claim promptly. This she has failed to do.

In sum, when the facts are appraised and the equities weighed, as was noted in *Billings* and as suggested in the opinion of this Court, it is apparent that the decision should be as it was—that the discovery rule should not be applied to the instant case. This was no hasty decision; the trial court devoted a great deal of time and study to the problems at hand (A.R. 20). It properly followed the guidelines set down by the Circuit Court, in line with the thoughts and philosophies of the only Idaho decision available. The conclusions it reached are fully supported by its findings of fact, and its determination must be affirmed.

III

THE TRIAL COURT PROPERLY DISMISSED THE APPELLANT'S COMPLAINT IN THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE FACT SHE WAS A MARRIED WOMAN.

With the court's determination that the discovery rule should not be applied to the instant case—that her

case of action, if any, "accrued" upon the occurrence of the acts complained of, it follows logically that the action is barred by Section 5-219 of the Idaho Code in that it was filed more than two years after it accrued. However, counsel for appellant has raised another contention—that Section 5-230 of the Idaho Code provides that a married woman is under a disability to bring a suit during the period of her marriage and that the appellant was married at the time of the alleged malpractice and until August of 1959, or as the court found (T.R. 219), on or about September 1, 1959. Subsequent to that, he contends, the statute was tolled again by the absence of Dr. White.

Looking first to the question of the inability of a married woman to bring a cause of action, the trail court concluded, in dismissing the complaint, that the appellant's marital status did not toll the running of the statute of limitations (T.R. 220). This conclusion must be affirmed.

> Section 5-230 of the Idaho Code provides as follows:
> "If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either: . . .
> "A married woman, and her husband be a necessary party with her in commencing such action;
> "The time of such disability is not a part of the time limited for the commencement of the action."

If a woman had no legal capacity to commence an action by herself, without her husband, and thus stopped the statute of limitations from running, it would obviously be unfair to allow the statute to run against her while she was so handicapped. The above statute was designed to toll the statute of limitations while such a disability existed.

However, in Idaho a married woman has capacity to commence an action in her own name alone for recovery of personal injury damages. Her husband is not "a necessary party with her in commencing such action" and the above statute has no application. The Idaho case directly in point is *Muir v. The City of Pocatello*, 36 Idaho 532, 212 Pac. 345 (1922).

In *Muir*, the plaintiff was injured in a fall on a city side walk. She commenced suit in her own name within the statutory period in February, 1918. After the statute of limitations had run, defendants moved to strike the complaint on the grounds that the husband was a necessary party plaintiff. The court permitted the plaintiff to amend, adding the husband, and defense demurred to the complaint on the grounds that the action was barred by the statute of limitations. The court held that the wife had effectively commenced the action in her own name before the statute of limitations had run, and that the amendment did not set forth a new cause of action. In discussing the issue, the court noted that the question in that form had never been presented to the Idaho Supreme Court, then stated, at pages 539-540, rest in other jurisdictions:

> ". . . the weight of authority and perhaps the better reason sustain the view that a married woman has such an interest in a cause of action for injuries to her person or character that she should be permitted to maintain actions of this kind, although her husband is a proper or even necessary party, in order to render the judgment res adjudicata against both members of the marital community. It may be questioned whether one of this class of citizens, now fully emancipated under the federal constitution as citizens of the United States, can be deprived of this right solely because of her being a married woman,

without denying rights and immunities granted by fundamental law, when other citizens have such rights, particularly in view of C.S., Sec. 6637, which provides that: 'A woman may while married sue and be sued in the same manner as if she were single etc.'

"However this may be, the trend of modern legislation and also of judicial decisions is toward recognizing the right of a married woman to sue alone for personal injuries to herself. California, by the amendment of 1913, now permits her to maintain this action without joining her husband, but prior to this, by a long line of decisions, it was always held under statutes similar to our own that she was a necessary party. The Idaho legislature, L. 1915, page 187, added to C.S., sec. 4666, following the clause which gives the husband the management and control of the community property, these words: 'Except the earnings of the wife for her personal services, and the rents and profits of her separate estate.' If a married woman has a right to maintain an action to recover for her personal services, she certainly should not be denied the right to maintain an action for an injury to her person or character. In *Chicago, B. & Q. Ry. Co. v. Dunn*, 52 Ill. 260, 4 Am.Rep. 606, in a jurisdiction where most of the common-law disabilities of married women then prevailed, Breese, C. J., said: 'A right to sue for an injury is a right of action —it is a thing in action and is property. (Kent Com. 432.) Who is the natural owner of the right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife; it was her body that was bruised; it was she who suffered the agonizing mental and physical pain.'

"If a married woman has such an interest in an action for injuries to her person or character that she

> may maintain an action therefor, even though her husband is a proper party, it would follow that her commencing such an action within the limitation period will toll or suspend the running of the statute so that the bringing in of the husband as a party after the lapes of this period would not be the substitution of a new or different cause of action, nor would the right of either party in so doing be barred by the statute."

The *Muir* case clearly establishes that a husband is not a necessary party for the purposes of commencing an action for recovery of personal injuires to a married woman. Thus the statute tolling the statute of limitations (5-230), if it still existed, is inapplicable by its own terms to the instant action. The appellant could at any time have brought her action in her own name. As her husband, under the law of *Muir*, was not a necessary party, there was nothing in her status to toll the statute.

We refer above to Section 5-230, "if it still existed", because in actuality it has been repealed by implication. That statute was first enacted in 1881. In 1903, Idaho enacted the so-called "Rights of Married Woman Act," now Section 5-304, providing as follows:

> "A woman may while married, sue and be sued in the same manner as if she were single: provided, that except in actions between husband and wife the husband shall not be chargeable with the wife's costs or other expenses of suit."

By terms of the bill enacting this statute, all statutes in conflict with it were repealed. As noted in *Muir*, Section 5-230 is in conflict with the Married Women's Act, and thus it must be held to have been repealed. (For a

more complete discussion of this issue, including a complete history of the two acts, as well as the two-year statute of limitations applicable here, Section 5-219, see our Memorandum in Opposition to Plaintiff's Motion to Amend, which is included in the clerk's transcript herein, T.R. 134-165. This memorandum was subsequently incorporated in this appellee's motion for summary judgment, T.R. 179-181, upon leave of the Court, T.R. 174.)

Even assuming, *arguendo*, that the statute tolling the statute of limitations were applicable, which we deny, and that the statute could be further tolled upon Appellee White's leaving the state on September 1, 1961, which we also deny, this matter is barred in any event. In accordance with the finding of the court, the married woman's disability would be removed by divorce on September 1, 1959 (T.R. 219). The time period from September 1, 1959, to September 1, 1961, is more than the two years permitted by the applicable statute of limitations. In computing time for purposes of statutes of limitations, the day on which the act in question was done is to be included. *Dowling v. Lester* (Georgia, 1946), 29 S.E.2d 576; *Gibson v. Kelley* (1953), 88 Ga. App. 817, 78 S.E.2d 76. Thus the time for commencing the action expired on August 31, 1961, while Appellee White was still in the state (Finding of Fact No. III, T.R. 219.)

In short, the appellant's contentions are without merit. Whatever the theory, the two-year statute of limitations set forth in Section 5-219 of the Idaho Code had expired before this action was commenced. Thus the dismissal was correct, and it must be upheld.

IV

THE APPELLANT'S CAUSE OF ACTION IS NOT SAVED BY ANY ABSENCE OF APPELLEE WHITE FROM THE STATE OF IDAHO SUBSEQUENT TO SEPTEMBER 1, 1961.

As noted above, counsel for appellant contends, at page 54 of his brief, that the absence of Appellee White from the State of Idaho after September 1, 1961, tolled the statute of limitations from that date on by virtue of the provisions of Section 5-229 of the Idaho Code that time of absence of a defendant "is not part of the time limited for the commencement of the action."

The trial court did not rule on this contention, having concluded that the appellant's cause of action accrued on September 1, 1951, and that the statute of limitations was not tolled by her marital status (T.R. 219, 220). Thus any question of absence of Dr. White some ten years later became moot. Furthermore, as discussed above, even if the statute had been tolled by the appellant's marital status until divorce September 1, 1959, the allowable time for commencement of suit expired on August 31, 1961—the day before Dr. White left the state.

The court found as a finding of fact:

". . . that all of the defendants were subject to the jurisdiction of this court, with the exception that during a part of the time between September 1, 1961, and the date of the filing of the complaint herein, on October 14, 1963, the defendant Raymond L. White was absent from the State of Idaho, and as respects the defendant, St. Luke's Hospital, a corporation, said hospital was incorporated, present

within the jurisdiction, and amenable to service of process at all times referred to herein." (Finding of Fact No. III, T.R. 219.)

This finding is fully supported by sufficient evidence (R. 27, 195, 196; T.R. 170-171, 177-178, with regard to presence and absence of Appellee White; T.R. 182, 183-185, with regard to continued presence of Appellee St. Luke's Hospital).

Thus, even if it could somehow be said that an action remained against Appellee White, which we deny, it is abundantly clear that as to this appellee, St. Luke's Hospital, the limitations period had expired long before the suit was commenced. St. Luke's Hospital never went anywhere. It could and should have been sued, if at all, within two years of the accrual of the cause of the action—by August 31, 1953, or, even assuming the validity of the married woman contention, by August 31, 1961. Any way that it is calculated, the date of filing—October 14, 1963—was far too late. This is so even if it were conceded that Appellee White was the agent of the hospital, as it is not necessary to join principal and agent as joint tortfeasors. 2 Am. Jur., Agency, Section 437.

Thus the judgment of dismissal must be affirmed.

V

THE COURT PROPERLY DISMISSED THE COMPLAINT IN THAT THE APPELLANT DELAYED UNCONSCIONABLY LONG, TAKING INADEQUATE ACTION, AFTER THE ALLEGED DATE OF DISCOVERY AND BEFORE SUIT.

As argued above, the record evidence and the findings of fact by the court are fully sufficient to support its determination that the discovery rule should not be applied to the instant cause, and that the complaint, therefore, was properly dismissed. However, as we argued before the trial court (T.R. 72-74), even if that determination were wrong, and if the cause of action could be said to have accrued with the August, 1962, "discovery" of the alleged malpractice, the action should still be barred by the appellant's further delay before filing suit—more than thirteen months later.

This Court made it clear in the remanding decision that application of the discovery rule to save an otherwise stale claim should be tempered by equitable consisderations such as a plaintiff's diligence and promptness in acting as compared to the attendant prejudice to the potential defendants:

> "This suggests, in our estimation, that the discovery doctrine is itself subject to some restraint as the time from the occurrence of the malpractice grows greater. In such circumstances, the considerations of fairness to the defendant underlying statutes of limitation become more insistent, while the plaintiff's appeals to equity implicit in the discovery doctrine become less so. We believe the Idaho courts would apply a concept akin to the equitable doctrine of laches to limit the discovery rule, a rule which itself has its genesis in equity. Thus, the suit of a plaintiff who is reasonably diligent may be barred if the defendant shows undue prejudice because of an extreme lapse of time between the commission of the wrongful act and the commencement of suit."

Here more than a decade elapsed between the alleged error and the date of discovery. In and of itself, this

period would be compelling upon a court acting equitably to hold that a defendant ought not to be subjected to suit upon deteriorated evidence. Thus, in the case of *Wilder v. Haworth*, 213 P. 2d 797, cited by the Court of Appeals, the Oregon court stated the following:

> "Moreover, broad consideration of justice required that there should be statutes of repose to prevent presentation of stale claims and discourage the assertion of fraudulent ones. 'The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.' *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 58 S. Ct. 785, 790, 82 L. Ed. 1224. Such protection is especially necessary in cases of the present sort. The physician and surgeon often are handicapped in their defense, because of the mute appeal that is made to the sympathies of jurors by the pitiable condition of plaintiffs in many malpractice cases. For obvious reasons, they should not be further handicapped by having to combat stale claims."

All the considerations set forth in the *Wilder* case demand that this appellant's suit be barred. But in addition to the long, and as previously noted, unnecessary, lapse in time between the alleged wrong and the date of discovery, the appellant then waited more than a year before instituting suit. It should be noted that many of the cases cited by the Court of Appeals in its discussion of the equitable considerations in applying the discovery rule were cases in which the statute of limitations period was set at a year. *Hundley v. St. Francis Hospital*, 327 P. 2d 131 (1958); *Greninger v. Fischer*, 184 P. 2d 694 (1947); *Costa v. Regents of University of California*, 254 P. 2d 85; *Agnew v. Lar-*

son, 185 P. 2d 851. Here the long delay is laches upon laches which has accumulated while the evidence has grown stale. Speaking in *Chemung Mining Co. v. Hanley, supra*, cited by the Court of Appeals, the Idaho Supreme Court set itself against dilatory practices, stating the following with regard to the trial court's discussion in denying an amendment:

> "Section 4229 was inacted for the protection of the diligent and those who have acted in good faith, and not for those guilty of inexcusable laches or who have neglected to preserve their rights when they have had abundant opportunity accorded them for that purpose."

Waiting more than a year after passage of more than a decade is too much in itself, but it is even worse when we consider what the appellant did during that time. She learned that a doctor disagreed as to the reading of a slide—an event that could happen without a hint of malpractice—and she went to a lawyer (R. 178, 180). Then she did nothing. There is nothing to show that either she or anyone for her sought any corroborating evidence or additional facts to suggest malpractice. There was nothing further to bring to the court a showing that she had been wronged and that special circumstances warranted giving her a day in court despite the delay. There was nothing but delay, and nothing offered to justify it. Then, finally, the appellant (or her counsel) filed suit without giving notice to the appellee hospital of a possible claim—without making a demand. She testified that she "knew" Appellee McCarter had received "notice" from Dr. Shaw and that she "assumed" he would tell Appellees Popma and White (R. 179). But she never even mentioned the appellee hospital. And, the "notice" to which she referred was hardly what one could consider a usual notice of

claim (R. 78). Counsel for appellant may contend that Appellee McCarter was in fact an agent of Appellee St. Luke's Hospital, but as discussed in a subsequent portion of this brief, there was no such showing.

In short, the appellant delayed eleven years before making inquiry as to the diagnosis. And if that is not enough to bar the claim, she and her counsel then delayed another thirteen months before filing suit. Bear in mind that this was not a delay of thirteen months after injury, as in the typical tort cases—this was thirteen months of unconscionable delay piled upon eleven years of unconscionable delay. Surely either is too much. Taken together, the conclusion must be that the appellant has waited too long, and that the judgment of dismissal must be affirmed.

VI

THE COURT PROPERLY DISMISSED THE COMPLAINT AS TO APPELLEE ST. LUKE'S HOSPITAL FOR THE FURTHER REASON THAT THERE WAS NO SHOWING THAT THE HOSPITAL WOULD BE LIABLE EVEN IF MALPRACTICE WERE PROVED ON THE PART OF THE DOCTORS.

At page 4 of this Court's opinion establishing the law of this case (T.R. 60), it was made clear that the plaintiff has the burden of justifying a long delay in bringing suit:

> "In addition, the burden of establishing a claim rests upon the plaintiff, and the stale nature of the evidence cuts two ways, mitigating against him as well as the defendant."

Here, the appellant seeks to assert a twelve-year-old claim against the appellee St. Luke's Hospital, but as argued before the trial court (T.R. 67-69, 81-83), there was no showing of any facts to justify dragging this hospital through the courts so many years after its only possible relation to the suit—or, for that matter, at any time.

The trail court rejected certain offers of proof by this appellee to show the lack of any master-servant or principal-agent relationship between the doctors and the hospital (R. 190, 192). However, the record as it stands is fully sufficient to sustain this argument upon appeal as a further reason for affirming dismissal of the complaint. As noted above, this Court placed the burden upon the appellant, and the appellant has failed to meet it.

In the first place, the appellant failed to offer any evidence of a master-servant relationship between the doctors and the hospital, even though the authorities hold that physicians do not generally stand in such a relationship:

> "Cases generally hold that the hospital is not liable for the negligence or malpractice of a staff physician in the treatment of his patient in the hospital. Emphasis is generally placed upon the contract for medical treatment between patient and physician, and the absence of any right of the hospital to control the physical conduct of the physician while he is ministering to the plaintiff." *Hospital Law Manual*, Health Law Center, University of Pittsburgh, Vol. IIa.

See also *Restatement of the Law of Agency, 2d*, Section 223, Comment A., recognizing that normally physicians employed by a hospital are not servants of the

hospital and it is only under particular circumstances that such is the case.

This precise question has not been considered by the Idaho Supreme Court, but authorities from other jurisdictions are relatively plentiful. The Colorado Supreme Court, for example, stated the following in the case of *Rosane v. Senger*, 149 P.2d 372, 374 (1944):

> "A hospital, a corporation as here, cannot be licensed to, and cannot, practice medicine and surgery. The relation between doctor and patient is personal. That a hospital employs doctors on its staff does not make it liable for the discharge of a professional duty since it is powerless under the law, to command or forbid any act by them in the practice of their profession. Unless it employes those whose want of skill is known, to it, or by some special conduct or neglect makes it so responsible for their malpractice (and no such allegation here appears) it cannot be held liable therefor."

The Illinois case of *Hoke v. Harrisburg Hospital*, Inc., 211 Ill. App. 247, involved a radiologist employed by the hospital, of which he was a shareholder and with which he divided earnings from x-rays. Even there the court held that the hospital was not liable for burns caused during the taking of x-rays, stating at page 252:

> "Even though Dr. Nyberg had been employed by the defendant as an x-ray specialist to operate the machine and to give x-ray treatments to the patients in the hospital, that would not in itself establish the relationship of master and servant so as to make the hospital liable for his negligent acts. The general rule is that such x-ray specialist is regarded as in the

same professional class as a doctor and proceeds upon his own judgment as to how and what should be done."

In the 1957 California case of *Mayers v. Litow*, 316 P.2d 351, an action against staff physicians and a hospital, the court affirmed a non-suit of the hospital:

"The judgment of non-suit in favor of defendant Midway Hospital was patently correct. Defendant Litow performed the surgery with the assistance of Dr. Feinstein. No evidence was introduced to show that any other possible agents or employees of the hospital were present during the operation. These two doctors were both on the staff of defendant Midway Hospital; this meant they were privileged to bring their cases to the hospital. Normally the question of agency is one of fact for the jury, (citing authorities) but in this case there is nothing in the record from which it may legitimately be inferred that defendants Litow or Dr. Feinstein was an agent or employee of the hospital."

In the Georgia case of *Porter v. Patterson*, 107 Ga. App. 64, 129 S.E. 2d 70, 74 (1962), the court found the hospital liable for acts of nurses in its employ, but recognized that the hospital would not be liable for medical acts:

"In taking this view these courts classify the acts of nurses and other employees for which the hospital is liable in tort as administrative or clerical acts, and the acts for which it has no liability as those which require medical skill or judgment (see 41 C.J.S., Hospitals, §8, p. 348) whether an act is merely administrative so that negligence in its performance is imputed to the hospital, or non-administrative depends on the nature or character of the act."

To the same effect is *Swigerd v. Ortonville*, 246 Minn. 339, 75 N.W.2d 217:

> "In taking this view these courts classify the acts of nurses and other employees for which a hospital is liable in tort is administrative or clerical acts, and the acts for which it has no liability as those which require an exercise of medical skill or judgment."

Where the physician in question maintains his own practice as well as serving on the staff of the hospital, it is almost universally held that he is not a servant of the hospital and that the hospital cannot be liable for his acts of malpractice. See *Hoke v. Harrisburg Hospital, Inc., supra; Mayers v. Litow, supra; Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N.E. 2d 415 (1942); *Smith v. Duke University*, 219 N.C. 628, 14 S. E. 2d 643 (1941); see also cases collected at 69 A.L.R. 2d 305, 325-332. Here both of the doctors alleged by the appellant to have been agents of St. Luke's Hospital—Appellee McCarver and Appellee White—maintained their own practices outside the hospital (R. 91,195).

In view of this general rule that a hospital is not liable for the medical acts of its staff physicians, it was incumbent upon the appellant to present evidence that she had a right to sue this hospital for the alleged acts of the appellee doctors. This would be so in any case—but particularly here where some twelve years have elapsed since the acts in question, with the evidence grown stale, and where the Court of Appeals has specifically stated that the burden of thus establishing a claim is upon the appellant.

Counsel for appellant at the June 2, 1965, hearing, at which he was supposed to offer evidence to justify

applying a rule to allow suit far beyond the applicable limitations period, called Drs. White and McCarter to the stand. But he asked them nothing with regard to the involvement of St. Luke's Hospital in their treatment of the appellant. In fact, when counsel for this appellee attempted to ascertain this information on cross-examination, counsel for appellant objected (R. 91, 158, 159, 190, 192). What was revealed, however, was that as respects the interpretation of slides, the medical activities of the pathologist, the hospital exercised no control (R. 91). The department head status and supervision by the hospital as respects Appellee McCarter were shown to be limited to record keeping and administrative functions (R. 90-91), which are of course not involved in this case. All that was shown as to Dr. White was that he performed the various surgeries at the hospital.

Counsel for appellant makes much of an argument that there was a continuing doctor and patient relationship between Appellee White and the appellant until well into the permissible statutory period (actually, the amended complaint alleges September of 1961—still more than two years before the filing of the action). As discussed above, the court found, on substantial evidence, that such was not the case (Finding of Fact No. 12, T.R. 119). However, even if it were, there was neither evidence nor argument of any continuing relationship with the appellee hospital. On the contrary, it was shown that, except for the 1956 thyroidectomy, all of the post-1952 contacts of the appellant with Appellee White occurred at his private office in Boise, rather than at St. Luke's Hospital (R. 195). Except for her treatment in connection with the 1951 surgery and the 1956 thyroidectomy, her only relationship with the hospital was sending checks to pay her bill (R. 170).

In short, the appellant has made no showing against the appellee hospital. Under the principles laid down by this Court in *Owens v. White, et al, supra*, it is clear that her claim is barred by the Idaho two-year statute of limitations unless she can show special circumstances delaying its operation. Surely one of these must be that she is suing a defendant that would have legal liabiilty if malpractice were proved. Having failed to do so, and upon application of the equitable considerations dictated by this Court, that claim must fail. Whatever the ruling may be as to the other findings and conclusions of the trial court, the judgment of dismissal as to this appellee must be affirmed.

CONCLUSION

In sum, what we have here is an attempt by the appellant to bring a claim far beyond the time allowed by the statute of limitations without any sufficient showing why she should be permitted to do so. Stated simply, the appellant is a skilled nurse, conscious of cancer and well aware of the improving techniques of diagnosis of that type of disease. She had notice even prior to the surgery she complains of that a mistake may have been made, she had full opportunity at any time thereafter to ascertain the facts of her case, and yet for more than a decade she did nothing.

The trial court, following precisely the procedure spelled out by this Court in its remanding opinion, has entered its findings of fact fully supported by substantial, competent evidence. From those facts it reached the only conclusions it could—that the appellant's claim, if any, accrued at the date of the acts complained of, that there was no showing of due diligence sufficient to justify application of the so-called discovery rule,

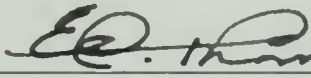
that prejudice to the appellees outweighs the desirability of allowing the appellant to present her claim, that under Idaho law the statute of limitations was not tolled by the appellant's marital status, and that, therefore, the twelve-year-old claim is barred by the two-year statute of limitations.

Over and above all the foregoing, it is manifest from the facts that the appellant should be barred by a further unconscionable delay of more than thirteen months after the alleged discovery of the wrong and, as to Appelle St. Luke's Hospital, a complete failure to show that the hospital could be liable even if malpractice were proved on the part of the doctors.

The trial court's dismissal of the appellant's complaint must be affirmed.

Respectfully submitted,

MOFFATT, THOMAS, BARRETT
& BLANTON

By 

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CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth

Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Of attorneys for Appellee
St. Luke's Hospital

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of May, 1966, I served three copies of the foregoing BRIEF OF APPELLEE ST. LUKE'S HOSPITAL upon the following:

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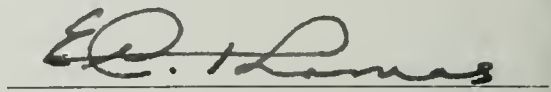
by depositing said copies thereof in the United States mail, postage prepaid, in envelopes addressed to said attorneys as indicated above, which addresses are the last addresses of the attorneys known to me.



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